



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: JUNE 08, 2022

IN THE MATTER OF:

Appeal Board No. 620611

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective June 23, 2021, on the basis that the claimant voluntarily separated from employment without good cause. The claimant requested a hearing. The Commissioner of Labor objected that the hearing request was not made within the time allowed by statute.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed December 29, 2021 (), the Administrative Law Judge overruled the Commissioner of Labor's timeliness objection and sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board, insofar as it sustained the initial determination.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant, a union member, worked for a school as a full-time maintenance worker for approximately six years until June 22, 2021 and earned \$39,500 annually. He also owned a landscaping business, where he performed lawn mowing and landscaping services to customers.

In April 2021, the claimant took a leave of absence from work because he had surgery. He was scheduled to be out of work for four to eight weeks. He was given extra leave time through the employer's "sick leave bank," which is

donated leave time from other employees. While on sick leave, he received 60 percent of his pay. He worked for his landscaping business while he was on a leave of absence from work. The employer's superintendent observed him performing services for the landscaping business and reported it to the employer. Subsequently, the employer notified the claimant that it was going to commence disciplinary proceedings against him for theft of services.

On or about June 21, 2021, the claimant and his union representative met with the employer. The claimant was facing discharge. Under the claimant's union agreement, the claimant was entitled to have a Section 75 hearing to dispute the charges. The employer told the claimant that if he did not resign, he would face disciplinary charges. The claimant elected to resign from the position rather than face disciplinary charges.

OPINION: The credible evidence establishes that the claimant lost his employment when he resigned rather than face disciplinary charges that could have resulted in discharge. The Court has repeatedly held that a worker who voluntarily leaves his or her employment in the face of disciplinary charges may qualify for benefits only if his or her actions did not constitute misconduct (See *Matter of Straw*, 32 AD3d 1098 [3d Dept 2006]; *Matter of Jimenez*, 20 AD3d 843 [3d Dept 2005]). In this case at hand, the claimant was told that if he did not quit, he would face disciplinary charges. The employer admitted that the claimant was facing discharge. The claimant elected to resign, not of his own initiative, but only after being told that the employer intended to bring charges against him for theft. Accordingly, we conclude that the claimant did not voluntarily separate from employment. As the employer considered that the claimant to have committed theft because he used donated sick time while on leave while performing services for his business, the issue of whether the claimant lost his employment due to misconduct should be referred back to the Department of Labor for investigation.

DECISION: The decision of the Administrative Law Judge, insofar as appealed from, is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective June 23, 2021, on the basis that the claimant voluntarily separated from employment without good cause, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

The issue of whether the claimant lost his employment due to misconduct is referred back to the Department of Labor for investigation.

RANDALL T. DOUGLAS, MEMBER